

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
COPLEY PLAZA COMPANY	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Copley Plaza Company, 105 Court Street, Brooklyn, New York 11201, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 802738).

A hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 11, 1987 at 10:45 A.M., and was continued to conclusion before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 25, 1988 at 1:15 P.M., with all documents to be filed by August 29, 1988. Petitioner appeared on the first hearing date by Michael Barr, C.P.A., and on the second hearing date by Christopher Panny, Esq. The Audit Division appeared at the first hearing date by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel) and on the second hearing date by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner has established that its late filing of returns and late payment of tax due under Tax Law Article 31-B occurred as the result of reasonable cause thereby warranting waiver of penalties imposed pursuant to Tax Law § 1446.2(a).

FINDINGS OF FACT

1. On September 4, 1985, the Audit Division issued to petitioner, Copley Plaza Company, a Notice of Determination of Tax Due under Tax Law Article 31-B ("gains tax") assessing a gains tax liability in the amount of \$575,374.60, plus penalty and interest. This notice, as issued, reflected a calculation of tax due at the rate of ten percent upon the gross consideration involved in the transfer of certain cooperative apartment units by petitioner to various individual unit purchasers. Calculation of tax in this fashion resulted from petitioner's failure to supply information, as requested by the Audit Division, whereby the Audit Division could compute the amount of petitioner's original purchase price for each of the units transferred.

2. The liability in question arises out of a plan of cooperative conversion whereunder petitioner, as sponsor, transferred certain real property on March 9, 1984 to a cooperative housing corporation known as 41 Eastern Parkway Corp. (the "realty transfer"). On said date, and on various dates thereafter, shares pertaining to certain individual apartment units, together with proprietary leases appurtenant to the individual apartment units, were transferred by petitioner to various individual apartment unit purchasers. A total of 36 individual apartment

units were transferred by petitioner on or subsequent to the March 9, 1984 realty transfer date. Returns were not filed at the time of any of such unit transfers nor was tax paid on any of such transfer dates. At various times subsequent to the unit transfers, petitioner filed returns and ultimately paid most of the tax due on such unit transfers. It is for the delay in filing and payment that the penalty at issue in this proceeding was imposed.

3. Subsequent to the issuance of the September 4, 1985 notice of determination and subsequent to commencement of the proceedings herein, petitioner supplied additional information to the Audit Division such that the Audit Division was able to determine petitioner's original purchase price for each of the units in question and thereby recompute and reduce petitioner's liability. Certain payments against the recalculated liability were made by petitioner leaving the remaining unpaid amount of tax determined to be due at \$17,883.00, plus interest. In addition to this amount of tax stipulated by the parties to be remaining as due, penalty in the amount of \$23,776.00 was calculated and imposed against petitioner by the Audit Division. This assertion of penalty arises, as noted, from petitioner's late filing of returns and late payment of tax due. The penalty is calculated based upon the full amount of tax due (as reduced post-assessment), which includes but is not limited to the \$17,883.00 amount remaining unpaid. Such calculation also takes into account the dates and amounts of the various payments made by petitioner.¹

4. Petitioner has conceded the accuracy of the foregoing figures as calculated. However, petitioner protests the imposition of penalty arguing, alternatively, that a) petitioner had reasonable cause for the delay in its filing of returns and payment of tax which should warrant abatement of the penalty, and b) should penalty be found appropriate petitioner maintains said penalty should be denominated interest or tax rather than penalty.

5. At the July 25, 1988 hearing, petitioner's representative appeared, requested and was allowed a period of time, specifically until August 8, 1988, within which to submit affidavit(s) from petitioner's principal(s) and/or from parties involved with the transactions, specifying the reason or reasons for which timely returns were not filed and for which payment was not timely made. On August 12, 1988, an affidavit made by one Francis J. Voyticky, a general partner in petitioner, was submitted. This affidavit states that at the time of the subject transfers, Article 31-B was a relatively new tax (having an effective date of March 28, 1983). The affiant asserts that petitioner and its accountants were unfamiliar with the gains tax and with statutory amendments thereto made in September 1984, thus making it difficult for petitioner to timely file correct returns and calculate and remit tax due. Said affidavit also alleges an improvement in petitioner's filing record for years after 1985. Petitioner offered no evidence or argument in support of its assertion that the amount calculated as penalty should, if upheld, nonetheless be denominated either as tax or interest.

CONCLUSIONS OF LAW

A. That Tax Law § 1446.2(a) provides as follows:

¹Interest was calculated to April 30, 1988 in the total amount of \$6,604.00, thus leaving \$48,263.00 as the amount asserted to be due as of such date (with interest accruing thereafter on the unpaid balance of tax and penalty).

"Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due, such interest penalty shall not exceed twenty-five per centum in the aggregate. If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

Further, Tax Law § 1442 specifies that:

"[t]he tax imposed by [Article 31-B] shall be paid by the transferor...on the date of transfer. In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred."

B. That petitioner has presented no evidence or argument which would support reduction or abatement of the penalty imposed. It is clear that the returns in question were not timely filed and that tax due on the transfers in question was not timely remitted. The assertions contained in the August 12, 1988 affidavit amount, at best, to a claim for abatement based upon ignorance of the law. Such an assertion does not form a basis upon which remission of penalties may be grounded and petitioner's request is, therefore, denied.

C. That petitioner advances no authority nor is there any authority for recasting as tax and/or interest those amounts properly calculated and denominated as penalty. Petitioner's argument, apparently aimed at gaining deductibility of such amounts for income tax purposes, is unsupportable as a matter of law and is rejected.

D. That the petition of Copley Plaza Company is hereby denied and the Notice of Determination of Tax Due under Tax Law Article 31-B as reduced in accordance with the parties' stipulation (see ___ Finding of Fact "3"), together with penalty and interest is sustained.

DATED: Albany, New York

October 27, 1988

/s/ Dennis M.

Gallier

ADMINISTRATIVE LAW JUDGE